U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 27 August 2003

BALCA Case No.: 2002-INA-175
ETA Case No.: P2000-CA-09497209/VA

In the Matter of:

PAK TRADING COMPANY, INC.,
Employer

on behalf of

MIRNA MORALES,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Felipe Insalata
Santa Ana, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a garment and accessory import and export business for the position of Warehouse Supervisor. (AF 35).[2] The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File.

[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

An application for Alien Employment Certification was filed on behalf of Mirna Morales ("Alien") by Pak Trading Company, Inc. ("Employer") on January 14, 1998. (AF 35). Employer indicated on the ETA-750A that the rate of pay for the "Warehouse Supervisor" position was $9.00 per hour. (AF 35).

Employer's recruitment report states that fourteen U.S. applicants were considered by Employer for the position of warehouse supervisor during the referral period. (AF 47-50). Seven applicants did not respond to a certified letter sent by Employer. Four applicants were considered by Employer to lack the necessary experience after the interview, one applicant did not appear for the interview, one applicant was interviewed and indicated no further interest in the position, and one applicant turned down the opportunity to interview. (AF 47-50). Also submitted in the recruitment report was a job posting which produced no referrals. (AF 50).

On December 10, 2001, the CO issued a Notice of Findings ("NOF") stating his intent to deny certification. (AF 31). The CO indicated that Employer had engaged in the unlawful rejection of U.S. workers. (AF 32). The CO found that two U.S. applicants, Masnicoff and Lehmkuhl, met the requirements for the job offered. (AF 32). Employer rejected applicant Masnicoff because he did not have experience in "handling items." (AF 32). Mr. Masnicoff, however, had been employed as a warehouse supervisor since 1997 and possessed a B.A. in Business. (AF 32). Employer rejected applicant Lehmkuhl because he had no experience in evaluating "stock levels and accurate records." (AF 32). Mr. Lehmkuhl had been employed as a warehouse manager since 1997. (AF 32).

The CO found that no special requirements had been indicated on the ETA-75 and, based on the requirements set forth in the ETA-750A, Mr. Masnicoff was qualified for the position. (AF 32). In reference to Mr. Lehmkuhl, the CO stated that Employer should have considered whether the applicant "could perform the stated job duties within a reasonable period of on-the-job training." (AF 32). The CO provided Employer the

opportunity to submit documentation establishing "how each U.S. worker named above has been rejected solely for lawful, job-related reasons." (AF 32).

In rebuttal to the NOF, Employer submitted further documentation under letter dated February 15, 2002. (AF 19-28). Employer addressed each applicant identified by the CO. (AF 19-20). With regard to applicant Masnicoff, Employer explained that while experience as a warehouse supervisor immediately qualified him for the position, Employer's experience with previous hires mandated that the experience be in Employer's industry. (AF 19). Additionally, Employer asserts that it was unable to verify the applicant's work experience. (AF 19).

In referring to Mr. Lehmkuhl, Employer argues that his experience was not as a warehouse supervisor. (AF 20). Employer was also unable to verify applicant Lehmkul's prior experience. (AF 20). Employer believed that this was sufficient reason to lawfully reject the applicants.

The CO issued a Final Determination ("FD") on February 25, 2002. (AF 6). The CO denied certification on the grounds that Employer's rebuttal, that the U.S. applicants were not qualified, was unpersuasive. (AF 7). Additionally, the CO found that Employer had failed to provide "a job related reason" for rejecting the applicants. (AF 7).

On March 20, 2002, Employer requested administrative review of the CO's denial. (AF 2). Employer claims it has employed "a good faith effort in the recruitment process" and has "rejected U.S. applicants only for lawful reasons." (AF 2). Citing *Gorchev and Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*), Employer acknowledges that it has an obligation to investigate the credentials of all apparently qualified applicants. Based on its inability to verify the applicants' prior employer, Employer contends that it had a legitimate, lawful reason to reject the applicants. Furthermore, Employer asserts that the CO ignored its good faith efforts in attempting to verify the applicants' credentials.

DISCUSSION

Pursuant to 20 C.F.R. §656.21(b)(6), if U.S. workers apply for the job opportunity, an employer must document that the U.S. workers were rejected solely for job-related reasons. An applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service,* 1990-INA-90 (Mar. 28, 1991); *Mancillas International Inc.,* 1988-INA-32 (Feb. 7, 1990); *Microbilt Corp.,* 1987-INA-635 (Jan. 12, 1988).

Furthermore, the employer bears the burden of proving that U.S. workers were lawfully rejected. *See Cathay Carpet Milll, Inc.,* 1987-INA-461 (Dec. 7, 1988)(*en banc*). In the instant case, Employer merely stated that applicant Masnicoff was not qualified for the position because he did not have experience in "handling items." (AF 32). Employer's vague response that Mr. Masnicoff was not experienced in "handling items" is insufficient to rebut the CO's findings that on the face of his credentials, Mr. Masnicoff possessed the necessary qualifications. Additionally, Employer never makes clear how Mr. Masnicoff's previous experience fails to provide him with the necessary skills to enable him to adapt from warehouse manager of bulk equipment to warehouse supervisor of "items."

Employer believed that Mr. Lehmukhl was not qualified for the position because he did not have experience in evaluating "stock levels and accurate records." Employer, however, has not established that Mr. Lehmukhl could not learn these skills with some on the job training. Considering his experience as a warehouse manager, it appears that Mr. Lehmukhl could perform the duties of the warehouse supervisor position with nominal training. *See Mindcraft Software, Inc.,* 1990-INA-328 (Oct. 2, 1991); *St. George's Medical Center,* 1995-INA-111 (Jan. 29, 1997).

The Board has considered Employer's position that it was unable to verify the applicants' credentials. However, as stated in *Livingston Health Care Ctr.,* 1993-INA-470 (April 6, 1995), it is unlawful to reject an applicant due to inability to obtain

information regarding an applicant's previous employment, where the applicant's help in obtaining such information is not elicited.

Employer states that it had an obligation to verify the applicants' credentials. Employer, however, provided no evidence that it attempted to solicit the applicants' help in verifying the prior employment. Therefore, Employer unlawfully rejected the applicants based on its inability to to verify the applicants' credentials.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.